No. 3436

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. M. HATHAWAY and FANNIE S. WINCHELL, as Administratrix of the Estate of V. W. WINCHELL, Deceased; and F. M. HATHAWAY as Administrator of the Partnership Estate of V. W. WINCHELL and F. M. HATHAWAY, Copartners, Formerly Doing Business Under the Firm Name and Style of EUGENE FORD AUTO COMPANY,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

Upon Appeal from the United States District Court for the District of Oregon.

ISHAM N. SMITH,
421 Mohawk Building,
Portland, Oregon,
Attorney for Petitioner.

No. 3436.

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Circuit Court of Appeals

For the Ninth Circuit.

F. M. HATHAWAY et al.,

Appellants,

vs.

FORD MOTOR COMPANY, a Corporation,

Appellee.

Appellants' Petition for Rehearing.

While ordinarily, the value of a petition for rehearing is best expressed by the algebraic quantity "X," yet we believe that a rehearing should be granted in this case, notwithstanding the evident care and consideration which it has already received.

Based upon the opinion and the record, we urge the following grounds as reasons for rehearing:

This Court erred,—

First: In failing to distinctly construe A. C. March 3, 1915, C. 90, 38, Stat. 956; Judicial Code, sec. 274 B (sec. B, U. S. Comp. Stats. 1916, Vol. 2, p. 2023).

Second: In failing to decide whether that Act adopts the reform procedure in actions at law.

Third: In holding and deciding (bottom p. 4, top p. 5 of Opinion) that the general rules of pleading a setoff and/or counterclaim apply to the facts at bar.

Fourth: In deciding that,—

"The payment was made in good faith under circumstances which justified it, etc."

Fifth: In deciding that,—

"The appellee's payment to the bank was not expressly or impliedly involved in, *but was entirely independent of the question of title or right of possession of the subject matter of the replevin action and the issues therein,* and the appellee's demand therefor is not merged in the judgment."

Sixth: In deciding that,—

"We need not pause to inquire whether the appellee's demand was pleadable as a counterclaim in the replevin action. We think it very clear that wholly aside from that question, the judgment in the replevin action was not *res adjudicata* in the present suit."

Seventh: In failing to hold that statutes permitting equitable defenses to be pleaded in an action, do not preclude resort to suits, to protect such equities.

These assignments of errors will be discussed hereafter.

In addition, we urge the following points:

Point 1. If the contract (Tr., pp. 9–35) be construed as Ford Company contends it should, then it creates a nonassignable, nontransferable personal relationship, and the attempt of Winchell and Hathaway to mortgage their lien is a nullity.

16 R. C. L., p. 282, sec. 323 (5).

Meyer vs. Livesley, 45 Or. 487 (489), 78 Pac. 670, 106 A. S. R. 667.

Meyers vs. Roberts, 50 Or. 81 (84), 126 A. S. R. 733, 15 Ann. Cas. 1031, 12 L. R. A., N. S., 194.

Point 2. The contract, at clause 15 (p. 16), clause 6 (p. 13), and clause 22 (pp. 18–19) is utterly inconsistent with the idea of a consignment of sale, and is consistent only with an absolute sale.

Point 3. Statutes which provide that equitable defenses *may* be interposed at law are universally held to prohibit the maintenance of a suit after judgment at law, based upon such equity, because the remedy is in the law action.

Point 4. The adequacy of a remedy at law has always been held to defeat jurisdiction in equity.

ARGUMENT.

THE PLEADINGS—PROCEDURE.

The authorities cited at pp. 4–5 of the Opinion relate to the general law and not to statutes governing the pleading of an equitable setoff or counterclaim in actions at law, and this Court so holds. It says:

> "The case comes within the general rule, and in the absence of a statute otherwise providing, a setoff or counterclaim may or may not be pleaded, etc."

The authorities cited are, as we understand them, as follows:

(a) *Virginia Car Chemical Co. vs. Kirwin,* 215 U. S. 249 (54 L. 179).

This was an action and not a suit. The Federal Supreme Court did not announce any rule governing that class of cases; it simply followed the rule

adopted in the state (South Carolina) from which the case arose.

(b) *Merchants Heat & Light Co. vs. Clow & Sons,* 204 U. S. 286 (51 L. 488).

This was an action and not a suit. However, in that case we note this language:

> "As we have said, there is no question at the present day, that by an answer in recoupment the defendant makes himself an actor and to the extent of his claim a cross-plaintiff in the suit.
>
> "See *Kelly vs. Garrett,* 6 Ill. 649, 652; *Ellis vs. Cothran,* 117 Ill. 458, 461, 3 N. E. 411; *Cox vs. Jordan,* 86 Ill. 560, 565."

We understand that case was decided by applying a local statute which had reference *solely* to legal actions.

The other authorities cited in the Opinion (pp. 5–6) are all *actions* and not suits.

Thus:

Moorehouse vs. Baker, 48 Mich. 335—Assumpsit.

Quick vs. Lemon, 105 Ill. 578—Action.

Davenport vs. Hubbard, 46 Vt. 200—Assumpsit.

Roach vs. Privett, 90 Ala. 391—Action.

But these authorities do not construe any statute like the Act of Congress involved. Furthermore, the present case is a *suit* and *not an action,* and the jurisdiction of equity is sought and depends upon the absence of a remedy at law. The bill (Tr., p. 8) says, par. 11, "That plaintiff has no plain, speedy or adequate remedy at law, but only in equity."

Under the Act of Congress here relied upon, and its construction as set forth at pp. 41–44 of our main brief, we urge that,—

First: The reform procedure has been adopted in actions at law;

Second: Equity cannot entertain jurisdiction of a suit based upon facts *which might have been* pleaded in the law action;

Third: The primary object of the reform procedure is to compel the litigation of all questions in one forum;

Fourth: The Ford Company was plaintiff below, and hence is the actor in this suit, and is not in the position of a mere defendant in an action; and being such plaintiff, that company should have sought relief in its own action, either

(a) By re-casting its pleadings and setting up its equities and transferring its action to the equity side of the Court; or

(b) By pleading its alleged equities in reply and asking for the case to be referred to the equity side.

But it cannot litigate the legal action, and after judgment against it there be permitted further to maintain an independent suit in equity on matters which it *may* have set up in the action.

We cite:

Ark.—Nichols vs. Shearon, 49 Ark. 75, 4 S. W. 167. (Ejectment.) Discussed, p. 80.

When the evidence of title produced by the defendant in an action of ejectment misdescribes the land, he cannot as a mode of defense to that action proceed by a suit in equity against the plaintiff to have

the deed reformed; but should make such equitable matter a ground of defense to the ejectment and move a transfer of any issue thus raised to the equity docket. And after judgment against the defendant in the ejectment suit his bill in chancery should be dismissed as the judgment against him could *not* be annulled or modified by decree in equity.

(80) "The bill was confessedly a mere mode of defense to the action of ejectment—its object being to control the proceeding in that case. But parties cannot litigate about the same subject matter both at law and in chancery at one and the same time. A defendant must make all of his defenses of whatsoever nature they may be, in the action in which he is sued; *and* if some of the issues raised are exclusively or more properly cognizable in another forum, he must *move a transfer* to the proper docket. This was the plain course for the heirs of William L. Nichols to pursue. And as the judgment against them in the ejectment could not be annulled or modified by any decree in the equity suit *except for a defense which had arisen or been discussed since its rendition,* nothing remained but to dismiss the bill."

In this case Ford Company made the payment within a few days after its replevin cause was filed and long before that case was tried, and all rights which it asserts because of such payment, were well known to it before the trial in that case.

Ga.—Field vs. Price, 52 Ga. 469 (470).

"The complainant on the trial of that case, *had the right and the opportunity* to have availed himself of any legal or equitable claim which he then had as fully

and completely as if the case had been pending in a court of equity, and if he failed or neglected to do so at the proper time, no one is to blame but himself. He has had his day in court, and must now abide its judgment, the more especially as he alleges no legal or equitable ground for the interference of the Court in his behalf.

"There was no error in the judgment of the Court below on the allegations contained in the complainant's bill."

Ida.—Utah & N. Ry. Co. vs. Crawford, 1 Ida. 770.

(Syllabus:)

(1) Under the Code of Procedure, a defendant is not only permitted, but is required, to set up all matters of defense, by answer in the original action, whether such matters are legal or equitable in their character.

(2) A defendant may not under the Code bring his separate suit in equity to enjoin the original action at law when his complaint consists of matter defensive to such original action.

(3) A defense, in the sense of the Code, is a right possessed by the defendant, which either partially or wholly, defeats the plaintiff's claim.

Ky.—Hackett vs. Schad, 3 Bush, 353 (66 Ky.).

The Code requires ALL defenses, equitable as well as legal, to be pleaded to an action at law; and an equitable right, thus available, may be lost unless thus litigated. Consequently, whenever the Court saw that there was a partial, and only partial, failure of consideration, it ought to have considered the

equitable defenses by transferring the case to the equity side of the docket, and by a commissioner or otherwise, have ascertained the extent of the failure and given credit for it in the judgment.

Thomassen vs. Townsend, 10 Bush, 114 (73 Ky.).

Suit resisting amount of attorney's fees allowed in an action on a note, wherein judgment by default was entered, upon the claim that such fees are a penalty and hence usurious.

Dismissed. Court says:

> "(116) Under the common-law practice contracts involving penalties were constantly enforced, but the judgments were relieved against by courts of equity. Under our Civil Code, the equitable defense must be made to the action at law, otherwise it will be waived.
>
> "It therefore results, that when a judgment is rendered by default in a case like this, upon a petition setting out the contract in accordance with the rules of pleading, the defendant will be without remedy."

Me.—Aetna Life Ins. Co. vs. Tremblay, 101 Me. 585, 65 A. 22. (In equity.)

(Syllabus:)

> (1) A judgment for the plaintiff in an action at law concludes the defendant not only as to defenses actually made, but also as to defenses which could have been made and were not.
>
> (2) The Court cannot afterwards afford relief in equity against a judgment at law because of matter which was a defense to the action and *could have been* interposed therein.

(3) *By R. S., c. 84, sec. 17.* Equitable as well as legal defenses *may be* pleaded in an action at law. Hence if equitable defenses are not so pleaded they cannot afterwards be invoked as cause for relief in equity against the judgment.

(4) A life insurance company by paying the full amount of the policy of life insurance to one holding an assignment of the policy as security only is thereby subrogated to all the rights of such assignee upon the insurance money as against any claim therefor by a subsequent assignee of the policy; and is entitled to have the amount due the first assignee under his assignment, deducted from the claim of the second assignee. Such right by subrogation exists without any formal assignment of his claims by the first assignee to the insurance company.

(5) Such right by subrogation is at least equitable matters of defense to an action at law upon the policy, by the second assignee, and under the statute (if not at common law) it *can* and hence *should* be interposed in such action. It is not ground for subsequent relief in equity against the judgment."

(P. 589.)

"It is suggested that the desired relief was not the company's right in the action at law, but was rather a matter of grace; that to have obtained the relief would have required a transformation of the action at law into a suit in

equity as provided by statute, and that the Court had the power to refuse to order such transformation. No such transformation was necessary. There was no difficulty in affording the desired relief in the action at law. The question of the validity and amount of the Cloutier claim could have been determined in that action, with or without the assistance of an auditor or jury as fully and accurately as in an equity suit. It was the right of the company to have that question determined in that action. * * *

"It follows, that a defendant cannot now withhold an available defense, even though equitable in its nature, in the trial of an action at law, and after judgment against him bring forward that defense in a new suit, and require the Court to give it effect by amending or reforming its former judgment. We think one purpose of the statute was not only to remove the necessity of, but to prevent such procedure.

"If, as is suggested, the Cloutier claim was before the Court in the action at law but was not considered or if considered was erroneously disallowed or if for any reason justice was not done in the action at law through accident, mistake or misfortune, and a further hearing would be just and equitable the company's remedy is by a petition for a review of that action, not by a new original suit alleging matters that were or could have been interposed in defense of the first suit."

Minn.—Fowler vs. Atkinson, 6 Minn. 305.

Under the Act of March 5, 1853 (Comp. Stats. 480), a defendant must interpose any equities he has by way of defense, and he cannot afterwards sue upon them.

Mo.—Kelly vs. Hurt, 74 Mo. 561.

If the defendant in an action at law having an equitable defense fails to present it, he cannot afterwards make it the ground of an independent action against the former plaintiff. (Per Sherwood, C. J.)

N. Y.—Savage vs. Allen, 54 N. Y. 458.

"An action cannot be maintained to restrain by injunction the proceedings in the same or another court between the same parties, where the relief sought *may* be obtained by a proper defense in such suit.

Winfield vs. Bacon, 24 Barb. 154.

(Syllabus, point 3:)

> "As a general rule, a defendant who has an equitable defense to an action, being now *authorized* to set it up by answer, *is bound to do so,* and he will not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action in the same court.

Foot vs. Sprague, 12 How. Pr. 355.

"Such a state of facts might not have been available as a defense to an action of ejectment at common law.

"But, I apprehend a court of equity, upon a bill containing this statement, would not have hesitated to restrain the prosecution of such an action, until the plaintiff should at least refund the purchase money he had received, and perhaps, make compen-

sation for the improvements made upon the lands by the defendant. If so it is now a good ground of defense. It is no longer necessary to bring a suit in equity to restrain inequitable proceedings at law. A defense, purely equitable in its character, may be interposed to a cause of action strictly legal. Indeed, the defendant MUST avail himself of such a defense in this way if he would do so at all; for it is no longer allowable to bring an action merely for the purpose of restraining the prosecution of another action pending in the same court.

Va.—Hage vs. Fidelity & T. Co., 102 Va. 1, 48 S. E. 494.

"The defense of equitable estoppel is, as a rule, as available in courts of law as in courts of equity, and the relief is as full and adequate in the one as in the other, and where the two courts have concurrent jurisdiction of the subject matters the defense *must* be made in that one which first acquires jurisdiction except in those cases where the jurisdiction of the law court is conferred by a statute which provides otherwise.

"A court of equity will not enjoin a judgment at law unless the party seeking such relief has failed in obtaining redress at law by reason of the fraud of the opposite party or inevitable accident or mistake and there has been no default on the part of himself or his counsel.

"The mere fact that a party has mistaken his rights and so has failed to make his defense at law, does not entitle him to relief in equity."

22 Cyc. 799 says, *inter alia:* "So where purely equitable defenses are clearly available at law, no injunction will be granted restraining an action at law because of the existence of such a defense, and equitable defenses *may* under the codes, be set up in an action at law, even though to make them effectual affirmative relief is necessary, and therefore they cannot be made the basis of an independent suit for such equitable relief."

23 Cyc. 1008, says: "If a party's defense to an action at law was not within the cognizance of the court of law, * * * he is, of course, not chargeable with negligence, etc., * * * but under the codes of practice which blend legal and equitable powers or confer extensive equitable powers upon the courts of common law, it is held that a defense, if available under the code, must be set up in the original action, and cannot be made the basis of a subsequent application to equity, although it is inherently equitable in its nature."

23 Cyc., p. 1200, says: " * * * but a judgment at law will not conclude defenses which were of a purely equitable character, and therefore not cognizable in an action at law, except in those states where the blending of law and equity *permits* all defenses of whatever character, to be set up in an action at law."

The Act of Congress under consideration was designed for some purpose: it was intended to make a change in proceedings in actions at law, and we believe that the change which it did make and was intended to make, was and is to blend legal and equi-

table matters so that in an action they may be set up. Of course, in a suit they always were blended and the result of the Act is to ingraft upon actions the reform procedure.

Furthermore, the Opinion on file says:

> "The case comes within the general rule that in the absence of a statute otherwise providing, a setoff or counterclaim may or may not be pleaded, etc."

But we have shown that all the authorities cited by the Court as sustaining the rule, are *actions* and not suits.

We rely upon the fundamental statement that equity has no jurisdiction where a law court *can or may* give relief.

We respectfully urge that this case calls for an interpretation of the Act of Congress and its application to the facts at bar.

Upon the above suggestions and those of like import urged in the main brief, we submit errors 1st, 2d, 3d, 6th and 7th, above specified.

SUBROGATION.

The Court says: (Opinion, p. 4.)

> "The appellee's payment to the bank was not expressly or impliedly involved in, but was entirely independent of the subject matter of the replevin action and the issues therein, and the appellee's demand therefore is not merged in the judgment."

The bill (Tr., pp. 2–9) is framed upon the theory of a contract (Exhibit "A") which related to and

governed the questions of both title and right to possession, and gave the lien for 85%—(entire sums advanced as purchase money)—which enabled the appellants to mortgage the property. The payment is said to have been made because the mortgage created a lien upon the property described in the complaint in the replevin action and the possession of which property was adjudged to be in Winchell & Hathaway. If the payment did not relate to the possession of this property and was entirely independent "of the question of title or right of possession" thereof, it is difficult to find a basis for Ford Co. to rest its claim of subrogation. Its entire theory of the case rests upon the claim that the payment was necessary because Winchell & Hathaway mortgaged its property which was involved in the replevin case, treated either as a possessory action simply or one involving both title and possession.

An examination of the authorities cited in the Opinion (pp. 3–4) discloses that subrogation was permitted there, because of the relation which the payments involved in each case bore to the property involved. Subrogation was decreed as an equitable remedy, and the rights arising were correspondingly enforced; but here, the payment was made to relieve the property involved in the replevin case of a lien and was made necessary (as it is claimed) by the contract which required the re-payment of the 85% paid on sight draft before the cars were unloaded, before the right to re-take the property could attach (see contract clauses 10, 13, 49); no other asserted right is or can be found in the bill, except as recited

above. It seems, therefore, that the entire case rested upon the theory that the payment was necessary to relieve the title of the property involved in the replevin case, from a lien which Ford Co. says was upon its property, so that the right to possession would again be in Ford Co.

But, we urge, that this situation does not and did not prevent the Ford Company from setting up its rights in the action at law, and that the permissive or elective right to do so operates to prevent an independent suit from being maintained, because a remedy in the law courts was available at all times after the payment, either (a) by amending the complaint and setting forth all rights, or (b) by pleading such rights in the reply and moving for transfer of the case to the equity calendar.

Aetna Life Ins. Co. vs. Tremblay, 101 Me. 585, 65 Atl. 22.

In addition, we add, that the contract at the following clauses is consistent only with a sale absolute, and not a bailment:

Clause 34, p. 27: (Provides for return of parts; no such clause relates to the return of the cars themselves, at agents' option.)

Clause 22, pp. 18–19: (Provides for sales ONLY of the cars; no right of return is given the agent.)

Clauses 15 and 7 construed together, mean that when Ford Co. is paid its 85%, the agents may sell on whatsoever terms may suit them.

This contract, therefore, provides in effect that the agents shall not have the right to return the property "consigned" while the right and duty to return the

specific property is the first and primary test in deciding whether a consignment is a bailment or sale.

Bailments. 6 C. J. 1086.

The statement in the Opinion that,—

> "The appellee's payment to the bank was not expressly or impliedly involved in, but was entirely independent of the question of title or right of possession of the subject matter of the replevin action and the issues therein * * * " it seems to us, hardly accords with the complaint or the theory of the case.

The subject matter of the replevin case was the right to the possession of these particular automobiles; the right of subrogation is claimed by a payment of a mortgage on these same automobiles; the contract says that Ford Co. must repay this 85% before taking possession of the machines and that Winchell & Hathaway have a specific lien on the property for that amount.

By reasons of these relations, the Ford Co. claims to have made the payment and on such theory the decree was based. Of course, we still insist the title passed to Winchell & Hathaway when they paid the 85% of this price, but on either set of facts the mortgaged property, as well as the mortgage, was directly involved in the question of both title and right of possession.

Winchell & Hathaway had no right to the possession in the first instance until they had paid the 85% and Ford Co. had no right to retake the possession until it had repaid it. Instead of making this payment to Winchell & Hathaway, it sought to pay

$12,000.00 of said sum to the bank and tendered the balance into Court, as set forth in paragraph VII of the amended complaint.

Disclaiming disrespect, we submit that the statement above made is incorrect.

We, therefore, feel justified in urging that the Opinion is the result of a misconception of the facts and of the relation asserted thereby.

In conclusion, we believe that this case calls for the construction of the Act of Congress as above urged; but if your Honors adhere to the view that such Act merely enables or permits the pleading of certain defenses, then we insist that the fact that the law provides a permissive and elective remedy is sufficient to defeat the jurisdiction of equity and a re-hearing should be granted herein.

Respectfully submitted,

ISHAM N. SMITH,

421 Mohawk Building, Portland, Oregon,

Attorney for Petitioners.

I, Isham N. Smith, the petitioning attorney herein, do hereby certify that I am the attorney who prepared the above and foregoing petition for rehearing; that I have carefully considered the same and that such petition, in my judgment, is well founded in law and in fact, and is not interposed for the purpose of delay.

Dated June 2, 1920.

ISHAM N. SMITH,

Attorney for Petitioners.